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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 978.

LESLIE G. BOWEN, PETITIONER,

VS.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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INDEX

Petition for Writ of Certiorari—

Summary Statement of the Matter Involved 1
Jurisdictional Statement 7
The Question Presented 9
Reasons Relied On for the Allowance of the Writ 9
Prayer for Writ 10

Brief in Support of Petition for Writ of Certiorari—

Opinion of the Court Below 13
Jurisdiction 13
Statement of the Case 15
Specification of Error 15
Argument 16
Conclusion 24

Table of Cases Cited

Allen vs. United States, 164 U. S. 492, 41 L. Ed. 528 ..... 6, 17
Allis vs. United States, 155 U. S. 117, 39 L. Ed. 91 6
Brasfield vs. United States, 272 U. S. 448, 71 L. Ed. 345 ..... 7, 9, 10, 15, 17, 19, 20, 21, 23, 24
Burton vs. United States, 196 U. S. 283, 49 L. Ed. 482 ..... 9, 10, 14-15, 17, 18, 19, 20, 21, 24
Nick et al. vs. United States, 122 Fed. 2d 660 (C. C. A. 8th, 1941) 20
United States vs. Allis, 73 Fed. 165 ..... 6, 17

Table of Statutes Cited

Section 17(a) of the Securities Act of 1933 (15 U. S. C. A. 77q, 48 Stat. 84) 2
Section 5(a) of the Securities Act of 1933 (15 U. S. C. A. 77e, 48 Stat. 906) 2

Mail Fraud Statute (18 U. S. C. A. 338, 25 Stat. 873; 35 Stat. 1130) 2
Section 240(a) of the Judicial Code, the Act of March 3, 1911, Ch. 231, Section 240, 36 Stat. 1157, As Amended 43 Stat. 938 (28 U. S. C. A., Sec. 347(a)) 7, 14
Act of February 24, 1933, Ch. 119, Sec. 1-3, 47 Stat. 904, As Amended by the Act of March 8, 1934, Ch. 49, 48 Stat. 399, As Amended 48 Stat. 926 and 49 Stat. 1921 (18 U. S. C. A., Sec. 688) 7-8, 14
Rule 11 of the Rules of Criminal Procedure After Plea of Guilty, Verdict or Finding of Guilty of the Supreme Court of the United States, Promulgated May 7, 1934, As Amended 8, 14
Rule 38 of the Rules of the Supreme Court of the United States 8, 10, 14
Rule 39 of the Rules of the Supreme Court of the United States 8

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petition of Leslie G. Bowen respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On July 12, 1944, an indictment in thirteen counts (R. 1 to 53) was returned against the petitioner in the

United States District Court for the Western Division of the Western District of Missouri. The first six counts charged the use of the mails in the sale of securities in pursuance of a scheme to defraud, in violation of Section 17(a) of the Securities Act of 1933 (15 U. S. C. A. 77q; 48 Stat. 84). The seventh and eighth counts charged sending through the mail, in pursuance of the same scheme to defraud, of securities not registered in accordance with the provisions of the Securities Act, in violation of Section 5a of the Act (15 U. S. C. A. 77e; 48 Stat. 906). The ninth to thirteenth counts, inclusive, charged the use of the mails in pursuance of a scheme to defraud in violation of the Mail Fraud Statute (18 U. S. C. A. 338; 25 Stat. 873; 35 Stat. 1130).

The scheme charged is set forth in the first count of the indictment and is incorporated by reference in the remaining counts. In general, it was alleged that the three defendants, Leslie G. Bowen, Peter A. Marxen and Ray H. Andrews, organized an unincorporated association, known as Bowen Industries, for the alleged purpose of financing the invention, development and perfection by the defendant (petitioner here), Leslie G. Bowen, of a washing machine, a two-speed bicycle sprocket, a speed reducer and other machines; that for the purpose of providing a means for people to invest in the company, they issued what were called "pre-organization certificates," which later were exchanged for shares of the capital stock of Bowen Industries after its incorporation; that these "pre-organization certificates" were known as "units of membership" and were sold at a cost of $100 per unit; that to obtain the investment by various persons in these pre-organization certificates, the defendants made numerous allegedly false and fraudulent misrepresentations (over thirty in number), which are set out in great detail in the indictment.

The petitioner, together with his two co-defendants, was tried by jury upon the foregoing indictment, in the District Court for the Western Division of the Western District of Missouri. As a whole the evidence was that some time about 1931 the petitioner engaged in conversations with certain persons, concerning the building of a washing machine. These various persons gave sums of money to petitioner, and a small shop was established in Independence, Missouri, for the purpose of attempting to develop and perfect the washing machine. While this work was going on the petitioner manufactured a crude model of a two-speed sprocket for use on bicycles. This sprocket, which he later improved and patented, consisted essentially of a kind of planetary gear transmission which, when mounted on a bicycle, would enable the rider to engage a low speed gear for the purpose of riding up inclines and hills.

This model was exhibited to various persons and one David Fritzlen, then an employee of the Monarch Battery Company in Chicago, became interested in the device. He desired to take the sprocket to Chicago and engage in its manufacture on a royalty basis. The petitioner and Fritzlen went to Chicago during the year 1935 and entered into written contract under which Fritzlen was to manufacture the sprocket on a royalty basis (R. 259). These plans fell through and the petitioner and his associates then determined to attempt to manufacture the sprocket themselves. Accordingly petitioner undertook to establish a plant in Chicago. He stated that it was his intention to manufacture the various machines which would be necessary to make the component parts of the sprocket, for the reason that such machines could not be purchased, and it would have been too expensive to assemble the sprocket from parts made elsewhere. Space

was rented and petitioner began to assemble and develop various machines (R. 349, 350, 351, 478, 479). This work went on over a period of approximately five years, from 1937 until 1942. In April, 1942, the company was incorporated under the laws of Illinois and for the remainder of the period, up to the date of the indictment, engaged in the successful manufacture of various small war contracts (R. 569), after failing to fill a large contract for the Philco Company, due to petitioner's failure to develop screw machines which he had advised the company he could make. The petitioner also, in addition to his patents on the bicycle sprocket, had developed and patented a speed reducer, employing the same principle. Sprockets were never actually put into production at his plant in Chicago (although some parts were made) with the exception of a few models which were manufactured in connection with his activities with Fritzlen.

A great deal of equipment was either bought by the petitioner and his associates or was manufactured by him for the purpose of manufacturing the various parts of the sprocket. The value and utility of this equipment was disputed. A government witness, at one time general manager of the company, testified (R. 193) that at the time of his employment he appraised it at $18,000. An expert appraiser, testifying for the defendant, stated (R. 423, 425) that it had a replacement value new of $234,255.96.

This project during the period it was in progress, was first financed by the sale of what were called "pre-organization certificates." These certificates were sold for $100 each by various persons, including the co-defendants and numerous others. Meetings of persons interested in this company were held in Kansas City, Kansas, in a restaurant operated by the defendant, Ray H. Andrews. At that place demonstrations would be given of the sprocket

and of the speed reducer and those present would be invited to participate if they were interested. It was in connection with these various meetings, at which the petitioner appeared from time to time, and also in connection with the sale of units at various other times and places, that the alleged misrepresentations were made. After the company was incorporated the units previously sold were exchanged for an equal number of certificates of stock in the new company. Thereafter, the company borrowed money by issuing notes to various stockholders. The total value of units sold during this period, according to the company's stock records, was $193,720.00, and $45,168.46 was borrowed by issuing notes. The mails were used in connection with all of the foregoing, and there was no registration of stock under the provisions of the Securities Act of 1933.

The evidence as to misrepresentations made by the petitioner and the other defendants, as to the petitioner's activities in Chicago, and as to the disposition of the proceeds of sales of units and of loans, was conflicting. There was substantial evidence on the part of the government that many of the alleged misrepresentations laid in the indictment, and also others, were in fact made and that large sums of money obtained by the petitioner and his associates were unaccounted for. On the other hand, there was substantial evidence on the part of the petitioner, including some of the government's own witnesses, that he did not make the representations alleged in the indictment and that those representations which he did make were either true or he had ample reason to believe them to be true, and that the sums obtained from investors which came into his hands were applied for the purpose of furthering the development and manufacture of the bicycle sprocket and other inventions. There was no evi-

dence that petitioner had spent unusual sums for personal expenditures.

At the close of the evidence, petitioner's motion for a directed verdict was overruled, and the cause was submitted to the jury. After the jury had deliberated for ten or twelve hours, the foreman sent a written communication to the Court (R. 591) which the Court told petitioner's counsel stated that the jury was hopelessly deadlocked. It later appeared that the jury's message actually read "This jury is deadlocked on a 11 to 1 verdict. F. B. Alderson, Foreman" (R. 595). The Court thereupon called the jury into the courtroom and verified the contents of the note by stating to the jury he assumed they had not reached a verdict, to which the foreman replied in the affirmative (R. 591). He then gave the supplemental charge appearing at R. 591, 592 and 593, and which in substance advised the jury that it was important that the case be decided, that they should take proper respect to each other's opinions and that if the larger part of the panel was for conviction, a dissenting juror should consider whether his doubt was reasonable; that if a majority was for acquittal, the minority should consider whether their judgment was correct, combined with a direction to consider whether the defendants were not guilty and a further direction to render a verdict of guilty in the event they found a defendant guilty. The instruction so given closely followed the one in *United States* v. *Allis*, 73 Fed. 165, l. c. 183, affirmed *Allis* v. *United States*, 155 U. S. 117, 39 L. Ed. 91, and in *Allen* v. *United States*, 164 U. S. 492, 41 L. Ed. 528. To this charge the petitioner excepted and moved that the jury be discharged on the ground that the charge, coming immediately after the jury's message, invaded the province of the jury, was coercive and was an invitation to render a verdict of guilty (R. 593). This

motion was overruled, and the jury was sent to bed for the night. At 10:30 A. M. the next morning (R. 604) a verdict was returned finding the petitioner guilty on all counts, and acquitting his co-defendants. The petitioner was sentenced to three years on each count, to be served concurrently.

The petitioner duly prosecuted his appeal to the Circuit Court of Appeals for the Eighth Circuit, assigning as error, among other things, the action of the District Court in giving the foregoing supplementary instruction, after being advised of the numerical division of the jury (R. 84 to 88), on the ground that the action of the trial Court was contrary to the holding in *Brasfield* v. *United States,* 272 U. S. 448, 71 L. Ed. 345. The United States Circuit Court of Appeals for the Eighth Circuit, by judgment entered February 21, 1946, affirmed the judgment and sentence of the District Court.

The ruling of the Court of Appeals upon the supplementary instruction aforesaid, given immediately after the court was advised of the numerical division of the jury, is the sole question presented by this petition.

B.

JURISDICTIONAL STATEMENT.

(1) The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, the Act of March 3, 1911, Ch. 231, Sec. 240, 36 Stat. 1157, as amended 43 Stat. 938 (28 U. S. C. A., Sec. 347(a)), which empowers this Court to review by certiorari the judgments of the Circuit Courts of Appeal in criminal cases, upon the petition of any party thereto; the provisions of the Act of February 24, 1933, Ch. 119, Sec. 1-3, 47 Stat. 904, as amended by the Act of March 8, 1934, Ch. 49,

48 Stat. 399, as amended 48 Stat. 926 and 49 Stat. 1921 (18 U. S. C. A., Sec. 688), which empowers this Court to prescribe by rule the times for and manner of applying for writs of certiorari in criminal cases; and, the provisions of Rule 11 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt of the Supreme Court of the United States, promulgated by this Court May 7, 1934, as amended, which provides that petition for certiorari in criminal cases shall be filed within thirty days of the entry of the judgment of the appellate court, and shall be made as prescribed in Rules 38 and 39 of the Supreme Court of the United States.

(2) The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered February 21, 1946 (R. 618). Thereafter that Court stayed its mandate until March 30, 1946, pending the filing of petition for certiorari by the petitioner (R. 619). This petition is filed prior to that date, and within thirty days from the entry of the judgment in the Court of Appeals, as required by Rule 11 above.

(3) The statutes set out in (1) above provide that this Court shall have the power to review by certiorari, the judgments of the Circuit Courts of Appeal in criminal cases, and to make rules governing petitions for certiorari. Rule 11 set out in (1) above provides such petitions shall be made in accordance with Rules 38 and 39 of this Court. This Court has jurisdiction under those statutes and under that provision of Rule 38 (5) (b) of this Court, which provides that this Court may grant certiorari where a Circuit Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this Court." The judgment of the Circuit Court of Appeals sustaining the trial court in giving the coercive instruc-

tion to the jury immediately after being advised by the jury that it was numerically divided 11 to 1, is in conflict with the decisions of this Court in *Burton* v. *United States*, 196 U. S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States*, 272 U. S. 448, 71 L. Ed. 345.

C.

THE QUESTION PRESENTED.

By sustaining the trial Court in giving the supplementary instruction to the jury urging agreement, directing the minority to consider the opinion of the majority and directing the jury to consider whether the petitioner was not guilty of some count, immediately after the jury had voluntarily by written message advised the Court it was deadlocked at 11 to 1, and the Court had verified the message by the general question that he assumed they had not reached a verdict to which the foreman replied in the affirmative, did the Court of Appeals decide a federal question in a way probably in conflict with the decisions of this Court in *Burton* v. *United States*, 196 U. S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States*, 272 U. S. 448, 71 L. Ed. 345?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The decision of the Circuit Court of Appeals upon the question presented by the trial Court's action in giving a coercive instruction to the jury immediately after he was advised by the jury in writing that it was deadlocked and numerically divided 11 to 1 and after he had verified that information as before set out, is in conflict

with the decisions of this Court in *Burton* v. *United States*, 196 U. S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States*, 272 U. S. 448, 71 L. Ed. 345, and is a ground for review by certiorari by this Court under that part of Rule 38(5)(b) of this Court, which provides that this Court may grant certiorari where a Circuit Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this Court." This Court, in *Burton* v. *United States*, strongly condemned a verification by the trial court as to the numerical division of the jury after he was advised of it by written message. The case was reversed on other grounds. Thereafter this Court held, in *Brasfield* v. *United States*, that the inquiry alone, as to how the jury stood numerically, without an indication as to the position of the majority upon the issues, was reversible error. The reason given was that such a inquiry is coercive. Where, as here, a trial Court by written message is voluntarily advised by the jury as to its numerical division, and the Court verifies that information by stating in the form of an inquiry that he assumes they have not reached a verdict, and then immediately gives an instruction urging a verdict and directing the minority to consider the opinion of the majority, a coercion is presented more certain and demonstrable than the mere inquiry as to the jury's numerical division, standing alone. The Court of Appeals decided this question in a manner in conflict with the applicable decisions of this Court.

E.

PRAYER FOR WRIT.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the

Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 13066, Leslie G. Bowen, Appellant, vs. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of the said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated March 15, 1946.

Leslie G. Bowen,
Petitioner.

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